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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GEORGE T. HART, et al.,
Petitioners,

VS.

JACINTO ZAMORA, Executor of the Estate of
JACINTO CLARK ZAMORA, JR., deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Constitution prohibit a police officer from temporarily detaining a mentally disordered person for psychiatric evaluation unless the mentally disordered person is armed or will "imminently" commit an act of violence?

2. Does an appellate court decision conflict with this court's ruling in *Anderson v. Creighton*, 55 U.S.L.W. 5092, when it fails to consider a police officer's contention that he is entitled to good faith immunity for an arrest under two separate statutory provisions, including one in which the appellate court concedes the factual circumstances would constitute probable cause "under some circumstances?"

3. Does an appellate court err when it reverses a trial court's action granting summary judgment when the reversal is based on the assertion that the record is insufficiently complete?

4. Does the opponent to a motion for summary judgment under F.R.C.P. 56 establish the existence of a material and genuine issue of fact merely by advancing evidence that infers that an item of evidence has been altered?

LIST OF PARTIES

The parties to the proceedings below include petitioners George T. Hart, individually and as Chief of Police of the City of Oakland, California, Tommie Lee Young, Sidney Rice, and Leon Drummer, each of whom were sued in their individual capacity and in their capacities as employees of the City of Oakland, and the City of Oakland, California. Respondent is Jacinto Zamora, executor of the estate of his son, Jacinto Clark Zamora, Jr.

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties	ii
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement of case	2
A. Initial contact between decedent and police	2
B. Decision to detain for psychiatric evaluation	3
C. The Lanterman-Petris-Short Act	4
D. The attempted arrest and shooting of decedent	5
E. The ruling of the district court	6
F. The ruling of the court of appeal	7
Reasons for granting the writ	10
I	
The Ninth Circuit's requirement of "imminency" in construing California's emergency psychiatric detention statute conflicts with decisions of the second circuit, federal district courts and numerous state appellate courts	10
II	
The Court of Appeal's refusal to consider petitioners' immunity defense conflicts with this court's decision in Anderson v. Creighton, 55 U.S.L.W. 5092	17
III	
The Court of Appeal decision conflicts with the decisions of this court on the evidence necessary to defeat a motion for summary judgment	19
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases

Page

Addington v. Texas, 441 U.S. 418, 99 S.Ct.1804, 60 L.Ed.2d 323 (1979) 11

Anderson v. Creighton, 55 U.S.L.W. 5092 (U.S. June 25, 1987) ..... i, 17, 18

Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) 21

Celotex Corp. v. Catrett, 477 U.S. ____, 106 S.Ct. 1348, 91 L.Ed.2d 265 (1986) 19

Colyar v. Third Judicial District Court, 469 F.Supp. 424 (D.Utah 1979) 13

Doremus v. Farrell, 407 F.Supp. 509 (D. Neb. 1975) 13

Hatcher v. Wachtel, 165 W.Va. 489, 269 S.E.2d 849 (W.Va. 1980) 13

Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972) 11, 14

In re Harris, 99 Wash.2d 276, 654 P.2d 109 13

Johnson v. County of Los Angeles, 143 Cal.App.3d 298, 191 Cal.Rptr. 704 (1983) 4

Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis. 1972), *vacated on other grounds,* 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), *on remand,* 379 F.Supp. 1376 (E.D.Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), *on remand,* 413 F.Supp. 13118 (E.D.Wis. 1976) 13

Lynch v. Baxley, 386 F.Supp. 378 (M.D.Ala. 1974) 13

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. ____, 106 S.Ct. ____, 89 L.Ed.2d 538, 54 U.S.L.W. 4319 (1986) 19

O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) 11, 12

People v. Ramey, 16 Cal.3d 263, 127 Cal.Rptr. 629 (1976) 18

TABLE OF AUTHORITIES CITED

CASES

Page

People v. Superior Court of Los Angeles County, 148 Cal.App.3d 990, 196 Cal.Rptr. 432 (1983) 14

People v. Triplett, 144 Cal.App.3d 283, 192 Cal.Rptr. 537 (1983) 14

Peraza v. Delameter, 722 F.2d 1455 (9th Cir. 1984) 21

Project Release v. Prevost, 722 F.2d 960 (2d Cir. 1983) .. 12

Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom.*, Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982) 11

Scopes v. Shah, 59 A.D.2d 203, 398 N.Y.S.2d 911 (3d Dep't 1977) 12, 13

Specht v. Patterson, 386 U.S. 605, 887 S.Ct. 1209, 18 L.Ed.2d 326 (1967) 11

Stamus v. Leonhardt, 414 F.Supp. 439 (S.D.Iowa 1976) .. 13

State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975)..... 13

Suzuki v. Alba, 438 F.Supp. 1106 (D.Haw. 1977), *aff'd in part rev'd in part dismissed in part sub nom.* Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) 13

Suzuki v. Yuen, 617 F.2d 173.....12, 13, 15

United States ex rel. Mathew v. Nelson, 461 F.Supp. 707 (N.D.Ill. 1978) 13

United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) 7

Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) 11

Whaley v. Kirby (1962) 208 Cal.App.3d 232, 25 Cal.Rptr. 50 (1962) 14

Whaley v. Jansen, 208 Cal.App.2d 222, 25 Cal.Rptr. 184 (1962) 14

Willis v. Tillrock, 421 F.Supp. 368 (N.D.Ill. 1976)..... 21

TABLE OF AUTHORITIES CITED

Statutes and Rules

Page

California Penal Code:
- Section 415(c) 8, 18, 19
- Section 12020(a) 7, 8

California Welfare and Institutions Code:
- Section 5000, et seq. 4
- Section 5150 ..... *passim*
- Section 5151 4
- Section 5200 5
- Section 5202 5
- Section 5256 5
- Section 5300 ..... 5, 15

Federal Rules of Civil Procedure, Rule 56 ..... i, 22

42 U.S.C. § 1983 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the Memorandum Opinion of the United States Court of Appeal for the Ninth Circuit, entered in the above-entitled proceeding on February 26, 1987, and with respect to which the Court of Appeal denied a Petition for Rehearing on April 20, 1987. The Order denying the Petition for Rehearing appears at pages A-84 to A-85 of the appendix hereto.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit is not reported and appears at pages A-45 to A-57 of the appendix hereto. The Order Granting Defendants' Motion for Summary Judgment of the United States District Court for the

Northern District of California is not reported and appears at pages A-1 to A-56 of the appendix hereto.

JURISDICTION

Respondent brought this action pursuant to 42 U.S.C. 1983. On October 10, 1985, the United States District Court for the Northern District of California granted Petitioners' motion for summary judgment and entered judgment for the Petitioners. On February 26, 1987, the United States Court of Appeal for the Ninth Circuit reversed the judgment of the District Court and remanded the case for further proceedings. Petitioners filed a timely Petition for Rehearing which was denied by the Court of Appeal in an Order filed on April 20, 1987.

STATUTES INVOLVED

The statutes involved are reprinted at A-58 to A-82 of the appendix hereto.

STATEMENT OF CASE

This action arises out of the shooting death of respondent's decedent, Jacinto Clark Zamora, Jr., by a police officer employed by the Oakland Police Department during the course of an arrest. In this action brought pursuant to 42 U.S.C. 1983, (see page A-82) respondent alleges that the police lacked probable cause to arrest Mr. Zamora; that the officers entered Mr. Zamora's home in violation of his rights under the Fourth Amendment; and that the police shot decedent without justification.

The facts underlying the action are set forth in the District Court's Order Granting Defendant's Motion for Summary Judgment which appears at pages A-1 to A-44 of the appendix. The salient facts are briefly summarized herein.

A. Initial Contact Between Decedent And Police

Mr. Zamora was 26 years of age and a former mental patient who had been hospitalized repeatedly; twice pursuant to California Welfare and Institutions Code section 5150, which permits

involuntary hospitalizations where a person appears to be mentally disordered and a danger to himself or others. (see page A-40-41, fn. 4)

On the day of his death, a neighbor called the Oakland Police Department complaining that Mr. Zamora had repeatedly called him a "nigger" and that this behavior had occurred on other occasions. Two police officers, Tommie Lee Young and Leon Drummer, responded to the call. The neighbor told the officers that Mr. Zamora had been armed with a bow and that he was concerned about the safety of his family. He threatened to take matters into his own hands if nothing was done. (see page A-4-5)

The officers went to the door of Mr. Zamora's home with the neighbor. At first, Mr. Zamora denied yelling at the neighbor, which caused the neighbor to become agitated and the police asked the neighbor to step back. Mr. Zamora then called the officers (both of whom were black) "niggers" and ordered them off the property. (see page A-6)

B. Decision To Detain For Psychiatric Evaluation

The officers returned to the neighbor's house and began to explain that there was nothing they could do. Mr. Zamora then appeared on his porch. He began haranguing the police, calling them "niggers" and stating that "you will know my name before the day is over. My name is Clark. I will kill you and I will kill all these niggers." The police state that he held an 18-inch sword and that "nunchaku" or "karate sticks" were hanging from his belt. (see page A-7)[1]

The officers concluded that Mr. Zamora was mentally disordered and that he was potentially dangerous. They made several calls for assistance, all of which were recorded. The transcript of

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[1] Robert Young, the neighbor who had initially called the police, saw the sword, but not the nunchakus. His description of Zamora's actions and words conforms to that of the police. (Clerk's Transcript, document 97, Exhibit 4, pp. 3-4, 9) The only other witnesses to this portion of the incident were two children across the street. They saw neither the sword nor the nunchakus. (page A-26-27)

the radio transmissions made by the officers were before the courts below. In one, Officer Drummer stated his concerns about Zamora's threats and weapons. He concluded by stating that "we are going to have to do something with this situation before he commits a [homicide] out here." (see page A-8)

These concerns led the police to consider obtaining a psychiatric evaluation of Zamora pursuant to the California Lanterman-Petris-Short Act, a discussion of which follows below.

C. The Lanterman-Petris-Short Act

The Lanterman-Petris-Short Act, California Welfare and Institutions Code 5000, et seq., provides procedures and standards for hospitalization and evaluation of persons suffering from mental disorders and chronic alcoholism. The Act includes a provision under which police may detain a person in order to permit a physician to evaluate and determine whether the person should be involuntarily hospitalized.

Under the act, treatment facilities designated by each county, are empowered to confine persons for up to 72 hours for evaluation and treatment. A peace officer or a mental health professional designated by the county may take a person to the treatment facility where probable cause exists to believe that person so detained suffers from a mental disorder and "is a danger to others or to himself or herself, or gravely disabled . . ." Welfare and Institutions Code section 5150. (see page A-58-59)

The statute requires the officer or professional to complete an application in writing stating the basis upon which probable cause exists. The treatment facility is not required to confine the person who has been brought for evaluation and treatment. Welfare and Institutions Code section 5151. (see page A-59-60) The determination to confine the individual can be made only by a physician; the police officer does not make this determination. *Johnson v. County of Los Angeles*, 143 Cal.App.3d 298, 315-6, 191 Cal.Rptr. 704, 716 (1983).

In addition to the emergency detention procedure, a person or agency designated by the county may petition the Superior Court for an order requiring any person to submit for psychiatric

evaluation. Welfare and Institutions Code section 5200 et seq. (see page A-62-67) Any individual may apply for such a petition, but the petition can only be filed by the designated person or agency. The statute further requires prepetition investigation of the allegations of the application including "a reasonable effort to personally interview the subject of the petition." Welfare and Institutions Code section 5202. (see page A-63-64)

After a person has been detained for 72 hours, the staff of the facility may certify that the individual is in need of an additional 14 days intensive treatment. Welfare and Institutions Code section 5250. (see page A-67-68) A person so certified is entitled to a hearing on the need for intensive treatment within seven days of the initial detention. Welfare and Institutions Code section 5256. (see page A-68-69)

The statute permits an additional period of confinement for up to 180 days. The standard for the additional treatment is more stringent than for the initial detention. The statute permits extended hospitalization only for persons who have committed, attempted or made a serious threat of substantial harm on the person of another and who "presents a demonstrated danger of inflicting substantial harm upon others." Welfare and Institutions Code section 5300. (see page A-70-72)

D. The Attempted Arrest And Shooting Of Decedent

Officer Sidney Rice arrived on the scene and was briefed on the situation. Zamora then appeared on the porch for a third time and resumed his haranguing. The police state that he still had karate sticks on his belt, but that he no longer held the sword. (see page A-10)

The officers decided to take Mr. Zamora into custody while he was outside his house and not in possession of his sword. The officers surrounded Zamora as he stood on his porch and told him he was under arrest. Mr. Zamora turned and ran into the house with the police in pursuit. (see page A-10)

The officers followed Zamora through the living room into the kitchen. There, Zamora turned on the police with sword they had seen him holding earlier. The police attempted to retreat back

into the living room, but not before Zamora inflicted a three to four inch stab wound in Officer Rice's back. (see page A-12-14)

The officers collided at the door to the kitchen and Officer Young fell to the floor. The police state that Zamora followed the police into the living room with his sword outstretched. Officers Rice and Drummer were unable to retreat any further because Officer Young was on the floor and unable to defend himself. Zamora continued to advance with his sword after a shouted command to halt. Officer Rice drew his revolver and fired a shot at Zamora's legs. When Zamora continued to advance, Rice fired two shots at Zamora's head, one of which inflicted a fatal wound. (see page A-14)

Officer Drummer immediately called for assistance and Technical Officer John Samuelson arrived almost immediately. He took photographs of the scene including a picture of the decedent's body. The picture shows the decedent holding the sword loosely in his right hand and the karate sticks hanging from his belt. (see page A-15)

The scene was investigated later by a forensic expert retained by the decedent's family. He found nothing in the physical evidence to contradict the police's testimony. (Clerk's Transcript, No. 110, Exhibit T-1 to T-5)

E. The Ruling Of The District Court

Respondent, decedent's father, commenced this action against the three police officers, the Chief of Police and the City of Oakland, the petitioners herein. Petitioners filed a motion for summary judgment on the ground that:

1. The officers had probable cause to arrest decedent;

2. The entry into the house was lawful;

3. The use of force was reasonable and in self defense; and in the alternative,

4. The officers were entitled to immunity on the ground that they acted in good faith in the belief that their actions were constitutional.

The District Court granted the motion, finding that:

1. The police officers had probable cause to arrest Zamora under:

(a) California Penal Code section 12020(a) which prohibits the possession of nunchaku or karate sticks; (see page A-73-81)

(b) California Penal Code section 415(3) which prohibits the use of offensive words inherently likely to provoke an immediate violent reaction (see page A-81-82); and

(c) California Welfare and Institutions Code section 5150 which permits a peace officer to detain a mentally-disordered person for psychiatric evaluation who appears to be a danger to himself or others.

2. The police officers attempted to arrest decedent in a public place and that they entered his house in hot pursuit. Under *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976), the police did not violate decedent's constitutional rights by entering his home without a warrant. (see page A-32-33)

3. The police officers acted in self defense and used only reasonable force. (see page A-33-38)

4. Because the District Court found that the police had not violated the decedent's constitutional rights, the court did not reach the petitioner's argument that the action was barred by the doctrine of good faith immunity. (see page A-44, fn. 11)

F. The Ruling Of The Court Of Appeal

The Court of Appeal for the Ninth Circuit reversed the judgment of the District Court, finding that a triable issue of fact existed on all of the respondent's claims. (see page A-45-87) Specifically, the Court of Appeal held that:

1. A triable issue of fact existed as to each of the grounds for probable cause asserted by the police;

(a) Two neighbor children viewed Zamora while he was outside, but did not see the sword or karate sticks. In the view of the Court of Appeal, this testimony prevented a

summary judgment on the violation of Penal Code 12020(a). (see page A-51)

(b) The Court of Appeal conceded that Zamora's racial taunts and insults could meet the requirements of Penal Code 415(c) "under some circumstances," but found a triable issue of fact nonetheless. (see page A-52) The Court of Appeal refused to give any effect to the neighbor's statement to Officer Drummer that he intended to take matters into his own hands if police failed to stop Zamora's taunts and race-baiting. The court noted: "... the single hearsay comment of one of the named defendants in this action is insufficient to eliminate all genuine factual questions regarding the likelihood of violence resulting from Zamora's slurs." (see page A-52-53)

(c) Because the Court of Appeal found that there was a triable issue of fact as to whether Zamora was armed, it found that summary judgment was improperly granted as to probable cause to detain under Welfare and Institutions Code section 5150. The court held that in addition to Zamora's threats, the police "must show that [Zamora] also brandished weapons in a sufficiently threatening manner to permit the conclusion he was a danger to himself or others." (see page A-49-50) The Court of Appeal noted petitioner's argument that California law does not require actual violence or imminent threat of violence as a prerequisite to emergency psychiatric detentions. The Court questioned whether the statute would be constitutional under such a reading. (see page A-50, fn. 2)

2. Because the Court of Appeal found that there was a triable question as to the legality of the arrest, it found that there was a triable issue as to whether the entry into the home was covered by the "hot pursuit" doctrine. Therefore, the court reversed the District Court on this issue. (see page A-53)

3. Focusing on the testimony of two witnesses, the Court of Appeal likewise found a triable issue of fact regarding the use of force. Respondent had retained an expert witness who testified that it was doubtful that Zamora would have retained his grip on

the sword after being shot in the head. A transcript of an interview of Officer Young describes the sword going "up in the air."[2] Because the photograph of Zamora's body shows the decedent holding the sword, the Court of Appeal found that a jury could infer that the police had placed the sword in decedent's hands and further infer that "the police were attempting to cover up the fact that Zamora was *not* killed in self defense." (see page A-54-56)

4. The decision of the Court of Appeal did not refer to petitioner's claim that they were entitled immunity because they acted in a good faith belief that their actions were sanctioned by the constitution.

Petitioners then filed a petition for rehearing in the Ninth Circuit. The petition argued that: 1) the court had improperly applied Welfare and Institutions Code section 5150; 2) the court failed to rule on petitioner's claim of immunity; 3) the ruling improperly applied the rule of probable cause; and 4) the evidence on the issue of self-defense was insufficient to defeat a motion for summary judgment.

Petitioner's petition for rehearing was denied, leading to this Petition for Writ of Certiorari.

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[2] The District Court found the testimony of respondent's expert to be internally inconsistent and implausible. The cited portion of the transcript of Officer Young's interview was not at issue in the District Court. On appeal, petitioners supplemented the record with the actual tape recording of the interview. The tape reveals the transcript to be inaccurate and to establish that Officer Young stated that the decedent held on to the knife after the shooting. (see petitioner's Motion to Supplement Record on Appeal) In all other respects, Officer Young's interview is consistent with that of the other officers and the theory of self-defense.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S REQUIREMENT OF "IMMINENCY" IN CONSTRUING CALIFORNIA'S EMERGENCY PSYCHIATRIC DETENTION STATUTE CONFLICTS WITH DECISIONS OF THE SECOND CIRCUIT, FEDERAL DISTRICT COURTS AND NUMEROUS STATE APPELLATE COURTS

Statutes in nearly every state permit police officers to briefly detain persons in order to obtain a psychiatric evaluation of a person. These evaluations determine whether the person is mentally disordered and whether further hospitalization is necessary. The Court of Appeal for the Ninth Circuit subjected petitioners to potential civil liability because they could not establish that Zamora was armed or that there was an imminent threat of violence. These requirements have been explicitly rejected by other federal and state courts. The many cases which have addressed the issue have articulated contradictory standards for the constitutionality of involuntary psychiatric hospitalizations. This Court should grant this petition in order to establish a uniform and clear standard for public officials throughout the country.

These statutes attempt to balance the rights of the individual against the need to protect the public. This balancing poses a particularly difficult problem for a police officer. Especially in urban areas, police may come into frequent contact with persons who are acutely psychotic and who may pose a serious risk to themselves or others. Police officers do not possess the training to conduct a psychiatric assessment even if it could be done so on the sidewalk.

The only realistic solution is to permit police to temporarily detain persons in order to obtain a professional evaluation where there appears to be a risk of violence. In this way, evaluation of the risk of violence is made by trained professionals and the risk of an erroneous decision is minimized.

Unfortunately, this procedure has produced a minefield for the law enforcement community. On the one hand, the threat of violence from a psychotic person is an ever-present, if unpredictable, reality of police work. At the same time, the police officer faces the risk that his or her actions will be second guessed and that a mistake in judgment will subject the officer to litigation. The dilemma is exacerbated by the contradictory legal standards which have arisen out of court decisions on the subject.

Involuntary civil commitment to a mental institution has been recognized by the United States Supreme Court as a serious curtailment of liberty. *Vitek v. Jones*, 445 U.S. 480, 491-92; 100 S.Ct. 1254, 1262-63, 63 L.Ed.2d 552 (1980); *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Consequently, civil commitment for any purpose requires due process protection. See *Vitek v. Jones*, supra 445 U.S. at 491-92, 100 S.Ct. at 1262-63; *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1808, 60, L.Ed.2d. 323 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, 45 L.Ed.2d. 396 (1975). Whether the state is acting pursuant to a parens patriae interest in promoting the welfare of the mentally ill (see *Rogers v. Okin*, 634 F.2d 650, 657-59 (1st Cir. 1980), vacated and remanded sub nom. *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442, 2447, 73 L.Ed.2d 16 (1982) or pursuant to its police power interest in preventing violence and maintaining order, 634 F.2d at 654-57; 102 S.Ct. at 2447, the state, in so acting, may not curtail or deny Fourteenth Amendment substantive or procedural due process protections in exercising such powers. See *O'Connor*, 442 U.S. at 580, 95 S.Ct. at 2496; *Specht v. Patterson*, 386 U.S. 605, 608, 887 S.Ct. 1209, 1211, 18 L.Ed.2d 326 (1967).

While there are admitted difficulties in attempting to define and measure the danger which must exist before a mentally ill person can be involuntarily committed, the United States Supreme Court has held that this does not prevent society from protecting itself from those who are dangerously mentally ill. *Addington v. Texas*, 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d. 323.

The Ninth Circuit, in reviewing the grant of summary judgment, concluded that probable cause to detain under Welfare &

Institutions Code section 5150 required a showing that, in addition to Zamora's threats, Zamora "also brandished weapons in a sufficiently threatening manner to permit the conclusion he was a danger to himself or others." Petitioners argued that probable cause existed under that section even if Zamora had not brandished arms. Noting petitioner's argument that the California statute does not require actual violence or imminent threat of violence as a prerequisite to emergency psychiatric detention, the Ninth Circuit questioned whether the statute so interpreted would be constitutional.

The Court's ruling with respect to the requirement of "imminency" was consistent with its holding in *Suzuki v. Yūen*, 617 F.2d 173, wherein the court, in passing upon the constitutionality of the Hawaii emergency detention statute, held that the danger must be imminent in order to justify an involuntary commitment, and the statute, as then worded, was unconstitutional.

In direct conflict with the Ninth Circuit's decisions in the subject and *Suzuki* actions is the decision of the Second Circuit in *Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). In the *Project Release* case, the appellant contended that without a finding of "substantial and present risk of serious physical harm as evidenced by recent overt conduct", an involuntary commitment is violative of due process. Id. at 971-72. The Second Circuit declined to follow the holding in *Suzuki* and concluded that the New York Civil Commitment scheme, considered as a whole, and as interpreted by the state court in *Scopes v. Shah*, 59 A.D.2d 203, 205-06, 398 N.Y.S.2d 911, 913 (3d Dep't 1977) to include a showing of dangerousness, meets the minimum due process standards without the addition of an overt act requirement. The New York statute did not include a requirement of imminence for emergency detentions.

Since the Supreme Court, in *O'Connor v. Donaldson*, fashioned the broad rule proscribing involuntary confinement of a nondangerous individual capable of surviving in the community, the lower courts which have addressed the issue of whether due process requires overt conduct or imminency as evidence of dangerousness are in serious disagreement. Some courts have found such a requirement constitutionally mandated while others

have not. Compare *Colyar v. Third Judicial District Court*, 469 F.Supp. 424, 434 (D.Utah 1979) [overt act not required]; *United States ex rel. Mathew v. Nelson*, 461 F.Supp 707, 710 (N.D.Ill. 1978) [same]; *Scopes v. Shah, supra*, 59 A.D.2d at 206, 398 N.Y.S.2d at 913 [same]; with *Suzuki v. Alba*, 438 F.Supp. 1106, 1110 (D.Haw. 1977), aff'd in part rev'd in part dismissed in part sub nom *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980) [overt act required]; *Stamus v. Leonhardt*, 414 F.Supp. 439, 451, (S.D.Iowa 1976) [same]; *Doremus v. Farrell*, 407 F.Supp. 509, 514-15, 517 (D. Neb. 1975) [same]; see also *Lynch v. Baxley*, 386 F.Supp. 378, 391 (M.D.Ala 1974) [overt act required]; *Lessard v. Schmidt*, 349 F.Supp. 1078, 1093 (E.D.Wis. 1972) [same], vacated on other grounds, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F.Supp. 1376, 1379 (E.D.Wis. 1974), vacated and remanded on other grounds, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand 413 F.Supp. 13118 (E.D.Wis. 1976) [reinstating prior judgment].

Yet another formulation is that adopted by the supreme courts of New Jersey and West Virginia. Those courts have held that a state may involuntarily detain a mentally disordered person where there is a "substantial" risk of harm "within the reasonably foreseeable future." *State v. Krol*, 68 N.J. 236, 260-1, 344 A.2d 289, 302 (1975). *Accord, Hatcher v. Wachtel*, 165 W.Va. 489, 269 S.E.2d 849 (W.Va. 1980).

In addition to the conflict which exists between the Ninth and Second Circuits, and amongst the district courts which have attempted to describe the conduct necessary to constitutionally justify an emergency detention, there are developing inconsistencies within the ninth circuit between the federal and state courts.

In *In re Harris*, 99 Wash.2d 276, 654 P.2d 109, the appellant contended, amongst other things, that dangerousness must be imminent and based on a recent overt act in order to justify involuntary detention. The Supreme Court of Washington, acknowledging that the Ninth Circuit, in *Suzuki v. Yuen*, struck down a Hawaii statute providing procedures for involuntary commitment because it failed to specify that the danger to self or others be imminent, declined to follow the Suzuki holding. The Court held:

> While . . . [the statute's] standard of dangerousness . . . conflicts with the holding in Suzuki, we do not feel imminent danger is required as a condition of involuntary commitment. The United States Supreme Court has spoken only generally on the issue, stating involuntary commitment requires a showing that the potential for doing harm is "great enough to justify such a massive curtailment of liberty. *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972).
>
> The many courts that have addressed the question have consistently required a substantial risk of danger to justify involuntary commitment. They have not, However, invariably required a showing of "imminence". [citation omitted]

With respect to the California emergency detention statute at issue in the subject action (Welfare & Institutions Code 5150), the appellate court which has addressed the issue of probable cause to detain under section 5150 has not imposed a requirement of "imminence." In *People v. Triplett*, 144 Cal.App.3d 283, 287-88, 192 Cal.Rptr. 537, 540-41 (1983), the court held that:

> To constitute probable cause to detain a person pursuant to section 5150, a state of facts must be known to the peace officer . . . that would lead a person of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person detained is mentally disordered and is a danger to himself or herself or is gravely disabled. In justifying the particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his or her belief or suspicion. (citation) Each case must be decided on the facts and circumstances presented to the officer at the time of the detention (citation) and the officer is justified in taking into account the past conduct, character, and reputation of the detainee. See also *Whaley v. Jansen*, 208 Cal.App.2d 222, 25 Cal.Rptr. 184; (1962); *Whaley v. Kirby*, (1962) 208 Cal.App.2d 232, 25 Cal.Rptr. 50 (1962).

In *People v. Superior Court of Los Angeles County*, 148 Cal.App.3d 990, 196 Cal.Rptr. 432 (1983), the court, in address-

ing the constitutional requisites of Welfare & Institutions Code section 5300, rather than section 5150, declined to follow the *Suzuki v. Yuen* decision. The court instead looked for guidance to the United States Supreme Court, and concluded, in terms equally applicable to section 5150, that:

> The minimal constitutional standard indicated by these decisions is a current mental illness which creates a serious potential of substantial harm to others. . . .
>
> Nowhere in its decisions does the Supreme Court define the danger which must be posed to justify involuntary commitment as "imminent," nor does it otherwise attempt to delineate a time frame within which the danger would be realized were the person released.
>
> The fault we find with the Ninth Circuit's insistence in Suzuki v. Yuen, supra, on legislative use of the term "imminent danger" is that it is merely a descriptive phrase, not a precise or quantifiable measurement of either mental condition or potential for harm. The constitution dictates the conditions which must exist before a state may act in certain ways. But it does not dictate the language which courts and legislators must invariably use to describe those conditions. Rarely, if ever, will there be only a single word or phrase capable of describing the constitutional standard. Use of the phrase "imminent danger" may be constitutionally adequate to describe the requisite condition, but it is not constitutionally compelled. Other language can describe the constitutional standard equally well.

The confusion resulting from the inconsistency in decisions will most likely increase, considering the fact that all states, with the exception of Mississippi, have special statutory provisions for the emergency detention of the mentally ill.[3] All such statutes have

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[3] ALA. Code (1975 & Supp. 1981) 22-52-7(b); ALAS. Stat. (1979 & Supp. 1981) 47.30.710(b); ARIZ. Rev. Stat. Ann. (1974 & Supp. 1981) 36-524(C), 36-525(B); ARK. Stat. Ann. (1971 & Supp. 1981) 59-1406(a); CAL. Welf. & Inst. Code (West 1972 & Supp (1980) 5150; COLO. Rev. Stat. (1973 & Supp. 1981) 27-10-105(1)(a), (1.1);

dangerousness at least as an alternative criterion for emergency admissions, and in a good many it is a necessary and by itself

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CONN. Gen. Stat. Ann. (West 1975 & Supp. 1981) 17-1183(a); DEL. Code Ann. (1974 & Supp. 1980) 16, sec. 5122(b); D.C. Code Ann. (1981) 21-522; FLA. Stat. Ann. (West 1973 & Supp. 1981) 394.463(1)(a) (1 & 2); GA. Code Ann. (1979 & Supp. 1980) 88-504.2, 88-504.3, 88-504(v); HAWAII Rev. Stat. (1976 & Supp. 1981) 334-59(d). 334-1; IDAHO Code (1980 & Supp. 1981) 66-326(a) & (d); ILL. Ann. Stat. Smith-Hurd (1966 & Supp. 1980) 91½, sec. 1-119, 3-602, 3-606, 3-607; IND. Code Ann. (Burns 1973 & Supp. 1982) 16-14-9.1-7(e); IOWA Code Ann. (West 1969 & Supp. 1980) 229.11, 229.22(3), 229.1(2); KAN. Stat. Ann. (1976 & Supp. 1980) 59-2909(c), 59-2908(a) 59-2912(a)(3), (b)(3); KY. Rev. Stat. Ann. (Michie 1977 & Supp. 1980) 202 A.040, 202 A. 030, 202 A. 050; LA. Rev. Stat. Ann. (West 1975 & Supps. 1981) 28:53(B)(2); ME. Rev. Stat. Ann. (1978 & Supp. 1981) 34. sec. 2333, sec. 225(7), (7)(c); MD. Ann & Code (1979 & Supp. 1981) 59, sec. 22(c); MASS. Ann. Laws (Mitchie/Law Co-op. (1981) 123-12(a), 123.1; MICH. Comp. Laws Ann. (1980 & Supp. 1981) 330.1427(1), 330.1401; MINN. Stat. Ann. (west 1982) 253A.04; MO. Ann. Stat. (Vernon 1979 & Supp. 1980) 632-305. 632.005(9); MONT. Code Ann. (1981) 53-21-129(1), 53-21-102(14); NEB. Rev. Stat. (1976 & Supp. 1981) 83-1020, 83-1009; NEV. Rev. Stat. 433A. 170; N.H. Rev. Stat. Ann. (1977 & Supp. 1981) 135-B:19; N.J. Stat. Ann. (West 1981) 30:4-38; N.M. Stat. Ann. (1979 & Supp. 1981) 43-1-10A, 43-1-10(B), 43-1-3(C); N.Y. Mental Hyg. Law (McKinney 1978 & Supp. 1981) 9.39, 9.41; N.C. Gen. Stat. (1981 & Supp. 1981) 122-58.18; N.D. Cent. Code (1978 & Supp. 1981) 25-03.1-25(2), 25-03.1-25(1), 25-03.1-25(5); OHIO Rev. Code Ann. (Baldwin 1980 & Supp. 1981) 5122-10, 5122.01(B); OKLA. Stat. Ann. (West 1979 & Supp. 1981) 43A, sec. 52.1A; OR. Rev. Stat. (1981) 426.175(1), 426.005(2), 426.180, 426.190; PA. Stat. Ann. (Purdon 1969 & Supp. 1980) 50, sec. 7302(a) 7301(a), (b); R.I. Gen. Laws (1977 & Supp. 1981) 40.1-5-7, 40.1-5-2(14), 40.1-5-1-1; S.C. Code Ann. (Law Co-op. 1976 & Supp. 1981) 44-17-410(1)(a), and (2); S.D. Codified Laws Ann. (1976 & Supp. 1981) 27A-10-1; TENN. Code Ann. (1977 & Supp. 1981) 33-603(a); TEX. Rev. Civ. Stat. Ann. Vernon 1958 & Supp. 1981) 5547-28; UTAH Code Ann. (1978 & Supp. 1981) 64-7-34(1),(2); VT. Stat. Ann. (1968 & Supp. 1981) 18, secs. 7504(a), 7505(a), 7508(d), 7101; VA. Code (1976 & Supp. 1981) 37-1-67.1, 37.1-1(15); WASH. Rev. Code Ann. (1975 & Supp. 1981) 71.05.150(d)(2), 150(a)(2); W.VA. Code (1980 & Supp. 1981) 27-5-

sufficient ground. There are fewer references to "overt acts" in the emergency detention statutes than there are in the long-term statutes, giving rise to the potential for repeated constitutional challenge.

The unsettled nature of the law on psychiatric detentions leaves law enforcement officials without a clear guidelines in this troubling field. The problem is particularly acute in a jurisdiction such as the Ninth Circuit where the federal Court of Appeal is in conflict with state courts. A police officer who acts in accordance with the ruling of his or her highest state court may face suit in a federal District Court that is bound to follow a contrary rule of the Court of Appeal.

Due to the need for reconciliation of the direct conflict created by the opinions of the Ninth, Second Circuits, and at least three state supreme courts; the importance of the due process issue raised; and the confusing and differing judicial approaches to this issue, plenary consideration of this matter is imperative.

II

THE COURT OF APPEAL'S REFUSAL TO CONSIDER PETITIONERS' IMMUNITY DEFENSE CONFLICTS WITH THIS COURT'S DECISION IN *ANDERSON V. CREIGHTON*, 55 U.S.L.W. 5092

After the Court of Appeal's order denying petitioners a rehearing, this Court issued its decision in *Anderson v. Creighton*, 55 U.S.L.W. 5092 (U.S. June 25, 1987) which extended the good faith immunity defense to warrantless arrests. The Court of Appeal refused to consider petitioner's claim of immunity, a claim that is clearly encompassed by the ruling in *Anderson*.

In *Anderson*, the Court held that a police officer is entitled to immunity from civil liability if he or she makes an arrest under circumstances which a reasonable officer could have believed constituted probable cause. The Court reversed a decision of the Eighth Circuit which refused to consider the police officer's

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2(a)(2), 27-5-3(a); WIS. Stat. Ann. (West 1957 & Supp. 1981) 51.15; WYO. Stat. (1981 & Supp. 1983) 25-3-110(a),(b).

argument that it was *not* clearly established that he did *not* have probable cause.

The instant petitioners are entitled to immunity from liability for the arrest on the same theory. The Court of Appeal held that there was no probable cause for the psychiatric detention if Zamora was not armed at the time he made the threats. The Court of Appeal did not consider whether the officers could have believed that there was a threat of violence even if it ignored their testimony that Zamora was armed. It was not contested that Zamora was armed when he harangued the neighbor earlier in the morning. In addition, there is no dispute that Zamora appeared to be mentally disordered and that he threatened to kill everyone in the neighborhood.

The existence of probable cause under Penal Code 415(c) is even more appropriate for the immunity defense. The Court of Appeal acknowledges that the taunts, insults and provocative words of the decedent could constitute a violation of the section "under some circumstances." This statement all but concedes the existence of facts sufficient to entitle petitioners to immunity under *Anderson*.[4]

The petitioners specifically brought to the attention of the Court of Appeal their contention that they were entitled to summary judgment based on the record before the court on the ground of immunity. At a minimum, this Court should remand the matter to the Ninth Circuit to consider the impact of *Anderson v. Creighton* on the petitioners' defense of immunity.

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[4] The Court of Appeal also failed to take into consideration the neighbor's statements that he was upset by Zamora's words and that he intended to take matters into his own hands. The Court of Appeal's ruling that the hearsay statement is insufficient to support a finding of probable cause is contrary to the law. *People v. Ramey*, 16 Cal.3d 263, 269, 127 Cal.Rptr. 629, 632 (1976).

III

THE COURT OF APPEAL DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE EVIDENCE NECESSARY TO DEFEAT A MOTION FOR SUMMARY JUDGMENT

The action of the Court of Appeal in this case is at odds with the decisions of this Court on the salutary role of motions for summary judgment. The Court of Appeal has overstated the burden on the moving party and understated the burden F.R.C.P. 56 imposes on the opponent. Review by this court will clarify the summary judgment procedure and give trial courts a tool to expeditiously resolve cases which do not require the expense or delay of a full trial. The third and fourth questions presented in this action are discussed in this section.

Throughout its decision, the Court of Appeal misstates the role of a court on a summary judgment motion. In reversing the summary judgment on probable cause under Penal Code 415(c), it finds that respondents' evidence is "insufficient to eliminate all genuine factual questions regarding the likelihood of violence. . . " On this issue, the Court of Appeal denied the motion for summary judgment on the apparent ground the facts had not been satisfactorily developed without stating what facts were missing.

The reasoning adopted by the court below conflicts with the directive of this Court that summary judgment may not be prevented by a mere "metaphysical doubt" regarding the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. ____, 106 S.Ct. ____, 89 L.Ed.2d 538, 54 U.S.L.W. 4319. (1986) The moving party in a summary judgment motion need only advance evidence sufficient to support a judgment in its favor. If the opponent cannot show that there is enough evidence to carry his burden of proof at trial, then summary judgment must be entered against him. *Celotex Corp. v. Catrett*, 477 U.S. ____, 106 S.Ct. 1348, 91 L.Ed.2d 265 (1986).

The Federal Rules of Civil Procedure contemplate that a motion for summary judgment will be heard on a record less voluminous than that which would be generated from a full trial. The evidence which the moving party advances in support of the

motion will be directed at making a prima facie showing of its entitlement to judgment. The evidentiary record may be concise, but summary judgment is nonetheless appropriate if the opponent is unable to controvert movant's case with evidence sufficient to warrant a trial. Requiring moving parties to amass a large body of evidence merely to satisfy a court's concern that the record be sufficiently "complete" would undermine the directive of Federal Rules that they be interpreted to "secure the just, speedy and inexpensive determination of every action."

The Court of Appeal also misstates the burden of the opponent of a motion for summary judgment. The Ninth Circuit reversed the District Court on the issue of self defense without any affirmative evidence to support the plaintiff's speculation that the decedent had been killed without justification. The Court of Appeal's action is based solely on evidence which—even if it is given any weight at all—only infers that a single item of evidence may have been altered.

The evidence upon which the Court of Appeal relies to reverse the summary judgment on the issue of self defense should not have justified a trial. The District Court properly rejected the evidence advanced by respondent; it was inconsistent, contradicted by other evidence and contrary to commonly known facts about human anatomy. (Clerk's Transcript, Document 109) The transcript of Officer Young's interview should be admissible only if accurate; the actual tape of the interview establishes that it is not.

Even if the evidence were considered, it could not support a verdict in the plaintiff's favor. This Court has rejected the notion that a party may oppose a motion for summary judgment merely by questioning the veracity of the movant's evidence or generating a peripheral factual dispute. As this Court recently held:

> The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." [citation omitted, emphasis in

original] Anderson v. Liberty Lobby, supra, 106 S.Ct. at 2512, 91 L.Ed.2d at 2512.

In this action, plaintiff has the burden of showing that the police used unreasonable force, that they were not entitled to defend themselves after decedent had seriously wounded one of the officers. *Peraza v. Delameter*, 722 F.2d 1455, 1457 (9th Cir. 1984). All of the physical evidence, notably the stab wound to Officer Rice's back, supports the police contention that they acted in self defense. Respondent answers by asking the court to permit a jury to speculate that in the moments between the time Rice was stabbed and the time Zamora was shot that Zamora dropped the sword and ceased being a threat.

The attenuated inferences drawn by the Court of Appeal do not fill the gaps in the respondent's case. Even if the jury believed that the sword had been placed in decedent's hand after the shooting, it would have no evidence with which to determine whether or not the shooting was in self defense. Nor would the jury have any basis to determine whether or not the police were entitled to a good faith immunity. Even if the jury assumed that Zamora was unarmed at the time of the shooting, the police would be entitled to immunity if they held a good faith, but mistaken belief, that Zamora posed an immediate threat. *Willis v. Tillrock*, 421 F.Supp. 368 (N.D. Ill. 1976). The evidence advanced by respondent fails to lay a foundation upon which a jury could rationally conclude that liability was a probability, rather than a mere possibility. A jury could find for the respondent on the issue of self defense only on the basis of guess, speculation and hunch.

This Court has recognized the burden imposed on public officials by groundless actions for injury arising out of the performance of their duties and has encouraged trial courts to resolve appropriate cases by way of summary judgment. *Butz v. Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). This purpose is ill-served by the action of the Ninth Circuit. Trial courts should be able to reject patently insufficient or implausible evidence without fear that an appellate court will reverse on the ground that they have "weighed the evidence." A case that is entirely one-sided should not go to trial merely because of one party's groundless speculation. A decision by this Court on this

case will help to achieve the purposes of the summary judgment rule by clearly delineating the power of the trial court under F.R.C.P. 56.

CONCLUSION

For the reasons stated above, the Court should grant this petition for writ of certiorari to review the decision of the United States Court of Appeal for the Ninth Circuit.

DATED: July 16, 1987.

Respectfully submitted,

By TODD BOLEY
Counsel of Record for Petitioners

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACINTO ZAMORA, Executor of the Estate of JACINTO CLARK ZAMORA, JR., Deceased, Plaintiffs, v. GEORGE T. HART, individually and as Chief of Police of the Police Department of the City of Oakland, TOMMIE LEE YOUNG, individually and in his capacity as an employee of City of Oakland, SIDNEY RICE, individually and in his capacity as an employee of of the City of Oakland, LEON DRUMMER, individually and in his capacity as an employee of the City of Oakland, and the CITY OF OAKLAND, Defendants.	No. C-84-3677 JPV ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter came on regularly for hearing on August 1, 1985, on the motion of all defendants for summary judgment. Todd Boley, Esq., appeared on behalf of the moving parties, with Richard P. Duane, Esq., appearing for plaintiff. Having considered the arguments of counsel, both as presented in the briefs and as developed at the hearing, and being fully advised in the premises, the Court hereby issues this Order granting defendants' motion for summary judgment.

II. BACKGROUND

This civil rights action under 42 U.S.C. § 1983 arises from the fatal shooting by Oakland police officers of Jacinto Clark Zamora inside his Oakland, California, home on June 28, 1982. Plaintiff, decedent's father, is the executor of his estate. Defendants are the Oakland police chief, the City itself,

and the individual officers involved in the slaying: Tommie Lee Young, Sidney Rice, and Leon Drummer. The complaint alleges that decedent's rights were violated by the conduct of the named officers in entering the home pursuant to an attempted warrantless arrest executed (it is claimed) without probable cause, and by the subsequent shooting of Zamora. Compensatory damages are sought.

The events of June 28, 1982, unfolded in three distinct stages. These may be characterized as follows: (1) decedent's initial public disturbances; (2) events outside the home following the arrival of police; and (3) events inside the house. Plaintiff endeavors to defeat the present motion for summary judgment by attempting to raise issues of material fact genuinely in dispute as to each stage. The following discussion, therefore, will focus on the differing versions of those

events as presented by the adverse parties.

1. Decedent's Initial Public Disturbances

(A) Defendants' Version

On the morning of the shooting, police were initially summoned to the neighborhood by Robert Young, who lived across the street and one house down from the Zamora residence. Mr. Young, a black man, complained that Zamora had accosted him verbally, "making racial slurs, hollering nigger, nigger all up and down the street ... [E]very time he catches me outside my house he does this." Dft's Ex. C, p. 1. When officers Young and Drummer arrived on the scene, Robert Young further informed them that Zamora had emerged from his house earlier that morning brandishing at least a bow and, possibly, arrows as well. See Drummer Decl., at ¶ 3; but see Duane Decl., Ex. 3, 4. Young stated that

Zamora had engaged in loud, abusive, and threatening conduct, that this most recent belligerence was but one example of an ongoing series of hostilities, and that Young was upset and concerned for the safety of himself and his family. Drummer Decl., supra; see also Duane Decl., supra. Finally, Young indicated that if the police did not do something he would take matters into his own hands. Drummer Decl., supra.

(B) Plaintiff's Version

In the early morning hours of June 28, 1982, Zamora was standing on the front porch of his house distractedly yelling the word "nigger." Robert Young, in the driveway of his home, hearing this epithet and took offense. He telephone the police, but by the time the officers Young and Drummer appeared Zamora had already reentered his house.

2. Events Outside the Zamora House

(A) Defendants' Version

Young and Drummer approached Zamora's house and knocked at the door. Zamora answered and, in response to police questioning, admitted shouting "nigger" from the porch. He denied, however, that his remarks were directed at Young. Aside from acknowledging his conduct Zamora was unhelpful and, indeed, became abusive with the (black) officers dispatched to interview him, calling them "nigger" as well. When asked his name, Zamora responded that it was "Clark," and ominously added, "You will know my name well before the day is over." This prophetic statement concluded the discussion, Zamora pausing only to add that he didn't have to tell the police anything, so "get the hell off my property." Zamora then slammed the door. Drummer Decl., at ¶ 5.

Returning to Young's property, the officers told him that, as yet, Zamora had committed only misdemeanors[1] and that they could not, therefore, enter his house to detain him. Drummer Decl., at ¶ 6.

Before the police could execute an incident report, Zamora once again emerged onto the porch. This time he wore a pair of nun-chaku sticks in his belt[2] and was holding a knife, sword, or machete with a blade some sixteen to eighteen inches in length. Drummer Decl., at ¶ 7; Duane Decl., Ex. 3, 4. Drummer and Young heard Zamora yell, "You niggers are no good. You are going to side with him [i.e., Mr. Young]. You will know my name before the day is over. My name is Clark. I will kill you and I will kill all these niggers." Drummer Decl., supra.

Zamora ran inside as the police approached. Officer Young went up to the door and call through it, asking Zamora to

come out and talk. The latter responded that he would not, and that if the police tried to enter he would "have something for you." Drummer Decl., at ¶ 8.

Returning to the police car, Drummer called the radio room to ask that a sergeant be dispatched to the scene. He stated that, "What we have here is a 5150 that appears to be extremely violent; made threats to the neighbors, came outside with a bow and arrow, etc., etc., and we are going to have to do something with this situation before he commits a 187 out here."[3]

Responding to this call, Sergeant Lance House arrived shortly thereafter. He informed Drummer and Young that he had been summoned to the Zamora home on previous occasions when family members complained about Clark Zamora's behavior. House further expressed the opinion that Zamora was mentally disturbed.[4]

- Discussing the situation, the police concluded that they had authority to enter the house without a warrant because they had seen Zamora commit a felony -- possession of the nun-chakus -- and because Zamora's apparent danger to himself or others constituted exigent circumstances. However, the peril involved in entering the house rendered such an attempt imprudent for the time being. Before departing, House told officers Young and Drummer that if Zamora's threats escalated they should use their own judgment; he further advised them that the best way to apprehend Zamora would be to wait until he reemerged from the residence. It was agreed that the most desirable course of action would be to take him in for psychiatric evaluation. Drummer Decl., at ¶ 11.

As House left the scene, officer Rice arrived to volunteer his assistance. Rice

Decl., at ¶ 2. While Rice was being briefed on the situation, Zamora stepped onto the porch a third time, without the sword, but still bearing on his belt the nun-chakus and holding an object later identified as needle-nosed pliers in his hand. Drummer Decl., at ¶ 12; Rice Decl., at ¶ 5. He commenced screaming obscenities at the police, and reiterated his threat to kill everyone in the neighborhood.

After a brief conversation on how best to proceed, the police resolved to attempt an arrest while Zamora was still outside. They then approached the porch. Officer Drummer shouted that Zamora was under arrest but the latter began retreating toward the door, saying, "I know what you are trying to do." Zamora then fled into the house with the police in hot pursuit. Drummer Decl., supra; Rice Decl., at ¶ 6, 7.

(B) Plaintiff's Version

Drummer and Young approached Zamora's house and knocked at the door. Responding to their knock, Zamora initially denied calling Mr. Young a "nigger," but said he could yell the word any time he wanted. Duane Decl., Ex. 6. He carried no weapons at this time.

The officers returned to their car; while they were discussing the situation, Zamora reappeared on the porch and began yelling obscenities at the police, demanding that they leave him alone. Again, he had no weapons. After unleashing this invective, he again retreated inside the house. Duane Decl., Ex. 7.

Sergeant House subsequently arrived on the scene. He advised Drummer and Young that he had previously been called to the home and that, in the course of these visits, he had spoken to family

members and thus knew Zamora to be suffering from brain damage. He, House, had never seen Zamora threaten or harm anyone and Zamora had in fact "quieted down" when police arrived. Duane Decl., Ex. 8. House further advised Drummer and Young that there was no need to arrest or detain Zamora. Id.[5]

After officer Rice had driven up, Zamora emerged onto the porch for the last time. The officers then decided to apprehend him. They "charged toward Zamora who had retreated inside [and] broke down the door...." Pltf's Opp. Memo, at 4:3-4; Duane Decl., Ex. 10.

3. Events Inside the House

(A) Defendants' Version

The police entered the house with Drummer in the lead, followed closely by Rice and then Young. Zamora crossed the cramped and cluttered living room and fled through a door leading into the kitchen at

the back of the house. As Drummer pursued Zamora through this door he saw him on the kitchen floor, rolling over as if to get back on his feet. Zamora was holding the sword which the police had seen earlier in the day.

Drummer yelled to the officers behind him to retreat; however, inertia carried Rice and Young partway into the kitchen, causing the withdrawing Drummer to collide with them. With all three in retreat, Young tripped and fell onto the living room floor. The other two policemen retreated as far into the living room as Young's prostrate body would allow. Drummer Decl., at ¶ 13; Rice Decl., at ¶ 8.

At some point before regaining the living room, however, Rice felt "something warm" in the right side of his back. Rice Decl., at ¶ 9. He reached around with his hand, felt a warm liquid, and knew that he

had been stabbed. Looking over his left shoulder, he saw a long shining object. Id.

As Drummer turned around in the living room, he saw Rice coming through the kitchen door. Zamora, behind Rice, was approaching with the sword in his hand. Rice turned around upon reaching the living room and, facing Zamora, drew his weapon. Zamora continued to approach. Rice ordered him to stop. Zamora continued to approach. Rice ordered him to stop. Zamora kept advancing. Rice fired one round at his legs in an unsuccessful attempt to stop him, then fired two quick rounds, one of which hit Zamora in the eye, injuring him fatally. Zamora fell backwards, still clutching the sword, and lay exsanguinating. Rice Decl., at ¶ 10; Drummer Decl., at ¶ 14.

Rice then yelled, "I've been stabbed, I've been stabbed, give me some first

aid." Observing a wound two or three inches in width on the lower right side of Rice's back, Drummer applied pressure with a towel in order to control the bleeding. With his free hand, he radioed for two ambulances and a technician. Drummer Decl., at ¶ 15.[6]

Arriving almost immediately, Technical Officer John Samuelson took photographs of Rice and the decedent. The latter photograph displays Zamora's body as it had fallen, with the sword still loosely held in his right hand and the nun-chakus suspended from his belt. Samuelson took into evidence a variety of items, including Rice's service revolver, the sword, the nun-chakus, a bow with three arrows. Samuelson Decl., passim, and ex. D, E, F.

(B) Plaintiff's Version

Because the only direct evidence concerning events inside the house comes

from the three officers physically present at the scene, plaintiff is constrained to rely on circumstantial evidence in order to rebut their account. Based on such evidence -- to be addressed more fully infra -- plaintiff hypothesizes that, once the police were inside the residence, Zamora and Rice struggled, after which Rice shot Zamora in anger. According to this version, virtually everything in the police presentation is either distorted or fictitious. In opposition to that presentation, plaintiff submits that an unarmed Zamora was pursued into the house by three rampaging policemen seeking to avenge the racial affronts which they had suffered; that once inside the police attacked and then assassinated Zamora; and that, in order to cloak the outrage which they had perpetrated, Rice, Drummer, and Young -- aided no doubt by the arsenal of odd weaponry they found strewn about the

home -- invented the tale of Zamora's armed and psychotic conduct on the porch of his home earlier that morning. The wound to Rice is scarcely addressed by this scenario; however, it may be inferred that the other officers were less concerned with the injury to their colleague than with a desperate attempt to arrange the evidence in a manner consonant with their fabrications. Thus, it is submitted, while Rice lay bleeding on the floor, Drummer and Young decorated Zamora's corpse, inserting the nun-chakus in his belt and placing the sword in his hand.

This improbably drama is based on various items of evidence discrepant to those offered in support of the police version. Because such evidence, to defeat the present motion for summary judgment, must be sufficient to show that there exist issues of material fact genuinely in

dispute, the following discussion will examine plaintiff's submissions in the context of Rule 56 of the Federal Rules of Civil Procedure.

III. DISCUSSION

1. Standard for Summary Judgment

Once a party seeking summary judgment has demonstrated that there are no genuinely disputed issues of material fact, the burden of coming forward with specific contravening evidence shifts to the opposing party. Soto v. City of Sacramento, 567 F.Supp. 662, 668 (E.D. Cal. 1983). It is not enought for the party opposing summary judgment to simply raise issues of fact; rather, he must present more than a scintilla of evidence tending to raise disputed issues sufficient to affect the outcome of the case. See, e.g. Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979); British Airways v. Boeing Co., 585 F.2d

946 (9th Cir. 1978); Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977); McGuire v. Columbia Broadcasting System, 399 F.2d 902 (9th Cir. 1968). It is insufficient for the opposing party simply to point out that the case is factually complex or that the motives of a party are at issue, Mutual Fund Investors, supra, at 624; nor may he "merely recite the incantation 'Credibility' and have a trial on the hope that a jury may disbelieve factually uncontested proof." Rineri v. Scanlon, 254, F.Supp. 474, 479 (S.D.N.Y. 1966).

Summary judgment may appropriately be granted in actions brought under § 1983. See, e.g. Standridge v. City of Seaside, 545 F.Supp. 1195 (N.D. Cal. 1982). Indeed, Rule 56 has been expressly recommended as a mechanism by which public officials may be sheltered from the harassment of the groundless lawsuits.

Butz v. Economy, 438 U.S. 478, 508, 98 S.Ct. 1894, 1911, 57 L.Ed.2d 895 (1978); see also Harlow v. Fitzgerald, 457, U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982); cf. Maiorana v. MacDonald, 596 F.2d 1072 (1st Cir. 1979), Donaldson v. Hovanec, 473 F.Supp. 602 (E.D. Pa. 1979).

It appears here that plaintiff's opposition amounts to little more than an incantatory attempt to assail the credibility of officers Drummer, Rice, and Young by an aggregate or errant and non-dispositive minutiae. Reviewing the various points upon which the parties' presentation of the evidence differ, the Court notes that "facts" are indeed at issue in this case. It is questionable, however, whether these facts -- even viewed in the light most favorable to plaintiff -- disclose anything but the truancies of experts, the foibles of

perception, and the imprecision of human memory.

2. Disputed Evidence

(A) Decedent's Initial Public Disturbances

Plaintiff first disputes the police contention that, during the period in which he was berating Mr. Young prior to the officers' arrival, Zamora appeared on his porch bearing both bow and arrows. Plaintiff adduces the transcript of the Oakland Police Department's Radio Room tape of the initial call from Robert Young to police on June 28, 1982, and the subsequent written statement executed by Mr. Young, neither of which makes reference to arrows. Duane Decl., Ex. 3, 14. Further, in a police interview the following day, Mr. Young expressly stated that he "didn't see no arrow." Duane Decl., Ex. 4. From this, plaintiff argues that one of the policemen's avowed reasons

for seeking to take Zamora into custody -- the presentation of deadly weapons -- evaporates.

The existence of arrows is, however, immaterial, since in a statement of July 14, 1982, Robert Young expressly notes that, during Zamora's second appearance on the porch, he saw decedent with the sword.[7] Suppl. Boley Decl., Ex. H. As to this aspect of the weapons issue, then, plaintiff's theory is without merit.

Secondly, plaintiff remarks the apparent inconsistency between the police insistence that Robert Young had complained of Zamora's prior threats and the omission from the previously-noted tape of any mention thereof. The transcript states that decedent had been "... making racial slurs, hollering nigger, nigger, all up and down the street.... I don't know what's wrong with

him.... It's happened this morning, it's happened before, it seems every time he catches me outside my house he does this." Boley Decl., Ex. C. Whether the sight of a (seemingly) deranged individual screaming "nigger" at seven o'clock in the morning would, either by itself or as part of a pattern, constitutes a "threat" to a black man of ordinary sensitivity in the nineteen-eighties may amount to a fruitful topic for sociological debate; it hardly serves to demonstrate the existence of a material fact necessitating trial on this issue.

(B) Events Outside the Zamora House

Plaintiff challenges the policemen's conclusion that they had probable cause to arrest Zamora on three grounds: first, the weapons issue; second, his insistence that no violation of California Penal Code § 415 had occurred; third, plaintiff's theory that no probably cause existed to

take Zamora into custody under Welfare & Institutions Code § 5150. These theories will be discussed sequentially.

(i) Probably cause generally

Probable cause for an arrest exists where at the time of making the arrest "the facts and circumstances within [the officers'] knowledge and out which they have reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). Under California law, which may be applied in determining whether a particular arrest was lawful in a ¶ 1983 action, Bergstralh v. Howe, 504 F.2d 1226, 1227 (9th Cir. 1975), a police officer may make a warrantless arrest:

1) Whenever he has reasonable cause to believe that the person to be arrested has

committed a public offense in his presence;

2) When a person arrested has committed a felony, although not in his presence;

3) Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

Cal. Penal Code § 836. It appears that the statutory requirements are amply met in the present case.

(ii) The weapons issue

In support of the argument that at no time had Zamora appeared on his porch brandishing any sort of deadly weapon, plaintiff submits the deposition testimony of Lucila Flores, Filiberto Flores, Josephine Lizama, Luz Vasquez, and Emily Perez, all of whom were present in the neighborhood at varying times and for diverse periods during the morning's events.

The bow and arrows have been discussed, as has the sword. Thus, the only question remaining is whether or not Zamora feloniously possessed nun-chaku sticks during this second and third appearances on the porch.

Reference is made to the nun-chakus by all of the officers involved. Drummer Decl., at ¶ 7; Rice Decl., at ¶ 5; Young Dep., Ex. 25 to Duane Decl. Clearly, the police were closest to Zamora, and had the best opportunity to observe him.[8] By contrast, the evidence presented by plaintiff is at best variegated. Emily Perez' deposition testimony is incompetent as to this point, since she departed the scene before police arrived and thus had no knowledge of Zamora's subsequent activities. Josephine Lizama arrived after Zamora's appearance with the sword; she testified that she neither noticed nor failed to notice anything hanging from

decedent's belt, noting that the incident happened "so fast" that Zamora's waist area "was something [she] really wasn't putting [her] eyes into." Supp. Boley Decl., Ex. I, at 4:3-4, 5:19-21. The unsworn statement of Luz Vasquez makes no reference to weapons one way or the other but is composed as a continuous narrative without any indication that questions were propounded to her. Finally, the Flores children witnessed the incident from inside the house across the street. They testified as to their failure to observe Zamora with either sword or nun-chakus. This, the most damaging testimony mustered by plaintiff, constitutes at best a scintilla of evidence in support of his position. When contrasted with the far more direct scrutiny of the officers involved -- and when further assayed against Robert Young's corroboration of Zamora's appearance with the sword -- it

is wholly insufficient to defeat the present motion as to the weapons issue.

(iii) California Penal Code § 415

California Penal Code § 415(c) makes it a misdemeanor for any person to use "offensive words in a public place which are inherently likely to provoke an immediate violent reaction." Id. Plaintiff argues that the requirements of the statute are unmet, in that none of those present at the scene other than the police officers suffered Zamora's fury. Thus, he submits, no misdemeanor was committed in the officers' presence, thereby depriving them of probable cause under Cal. Penal Code 836.1.

This is factually incorrect. Robert Young was repeatedly addressed as "nigger." Indeed, this prompted his call to the Oakland Police Department. To insist, as plaintiff apparently does, that the employment of this term, uttered

repeatedly, in a venomous tone, does not constitute offensive words within the meaning of § 415, is ipse dixit naivete remarkable only because of the vigor with which plaintiff pursues this awkward theory. His alternate argument -- that the very presence of policemen on the scene negates probable cause for the arrest under § 415(c) -- is equally absurd. As defendants properly point out, if this were so it would never be possible for a police officer to effect an arrest and the statute would be nullity. It thus appears to the Court that officers Drummer, Rice, and Young had probable cause to arrest Zamora under Penal Code § 415(c).

(iv) California Welfare & Institutions Code § 5150

In pertinent part, section 5150 provides that:

> When any person, as a result of mental disorder, is a danger to others, or to himself or herself ... a peace officer ... may, upon probable cause, take ... the person into custody ...[for] 72-hour treatment and evaluation.

Zamora's bizarre conduct on his porch on June 18, 1982, certainly suffices to establish probable cause for detention under § 5150. Robert Young told the police that Zamora had yelled at him while waving a bow, and that these actions led Young to fear for his own and his family's safety. Decedent later appeared on the porch with a sword. He harangued the police officers, making repeated assertions and promises -- e.g., "you will know my name well before the day is over" -- which would lead a person of ordinary care and prudence to believe to believe

(or to entertain a strong suspicion) that he was mentally disordered and a danger to himself or others. See People v. Triplett, 144 Cal.App.3d 283, 287-88, 192 Cal.Rptr. 537, 540-41 (1983). Zamora's history, including previous § 5150 detentions, was underscored by the appearance on the scene of Sergeant House, who stated his conviction that decedent was mentally disturbed.

Plaintiff's arguments seeking to rebut the existence of probably cause under § 5150 are unavailing, because inherently unrealistic. To have required the officers to dance attendance on Zamora until such time as he saw fit to turn his threats into reality would defeat the purpose of the statute. Section 5150 does not mandate that an officer stand passively by, waiting until an act of violence is committed before he takes steps to have a potentially dangerous

person evaluated by health professionals, and the Court is indisposed to read such a requirement into the law. Cf. Triplett, supra; Whaley v. Jansen, 108 Cal.App.2d 222, 229, 25 Cal.Rptr. 184, 188 (1962).

(C) Entry to the House and Events Therein

As previously noted, the police had resolved to attempt the arrest while Zamora was on his porch for the third time. Rice Decl., ¶ 5; Drummer Decl., ¶ 12. This attempt was frustrated by Zamora's retreat into the house.

Having had probable cause to make the arrest, and having notified Zamora of their intentions, the police further had probable cause to enter the building. An arrest which is set in motion in the doorway of a home is an arrest made in a public place, United States v. Santana, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976), United States v.

Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983), and a warrantless arrest in a public place on probable cause does not violate the Fourth Amendment. United States v. Watson, 423 U.S. 411, 415-418, 96 S.Ct. 820, 823-25, 46 L.Ed.2d 598 (1976). The mere fact that Zamora turned and fled into the house did not foreclose the police from following him. The doctrine of "hot pursuit," which precludes a suspect from defeating a lawful arrest, set in motion in a public place, by the simple expedient of escaping into a house, clearly authorized the entry here. See Santana, supra; see also Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

The final question concerns whether the police used only reasonable force in shooting Zamora in self-defense. A recent decision of the United States Supreme

Court clarifying when deadly force may be utilized prescribes that

> ... if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Tennessee v. Garner, 105 S.Ct. 1694, 1701 (1985) (emphasis added). In the present instance, the Court has before it the undisputed testimony of three police officers that Zamora rose from the kitchen floor and advanced on them bearing a sword. It is further undisputed that this sword was in fact employed to inflict an extremely severe injury upon officer Rice, and that Zamora was shot sometime thereafter. The police have given further evidence that, after being wounded but before firing, Rice drew his gun and ordered Zamora to halt. It was only when

Zamora continued to advance upon the police with the sword that Rice fired, fired at Zamora's legs, then at his upper body or head. This sequence of events, if true, would appear to be well within the scope of Garner.

The Court places great weight on the eyewitness evidence offered by the officers involved. Plaintiff's attempts to discredit their theory of self-defense, being based on speculation, are entitled to less credence. As the Court has previously observed, plaintiff's contention is simple: the police are lying in order to protect themselves from the liabilities which must naturally flow from their aggravated breach of professional conduct. The "evidence" which plaintiff advances to support this thesis is meager indeed.

Plaintiff maintains, for example, that the results of the autopsy on Zamora

found blood on decedent's hands but none on the handle of the sword. This meaningless proposition fails to support any particular theory of liability, and is in any event questioned by the testimony of both plaintiff's own experts, who acknowledged that the blood could have gotten on Zamora's hand as he was being taken out of the house after the sword had been removed from his hand. See Dfts' Ex. O, P.

Next, plaintiff submits the Declaration of Dr. Jose J. Ferrer, of the San Francisco County Coroner's Office. Dr. Ferrer hypothesizes that the nature of the wound suffered by Zamora would have made it difficult if not impossible for him to retain his grip on the handle after he was shot. An examination of the photograph taken of Zamora shortly after the incident reveals an attitude and posture which, however dramatic, is

entirely consistent with the police version. Decedent's body lies angled against what appears to be a baseboard, with his two hands -- the right holding the sword -- in exactly the same position of semi-flexion, indicating that muscle reflexes could have caused the body to retain its grip on the sword.[9]

Plaintiff's third argument based on the physical evidence at the scene is that the autopsy further revealed various minor bruises and scrapes on Zamora's body. This, he submits, is inconsistent with the police testimony that they had no physical contact with decedent prior to the shooting. Again, the purported cogency of this "evidence" vanishes when it is recalled that abrasions and contusions of this sort could have been suffered at any time prior to the shooting -- even before the officers arrived on the scene -- and plaintiff's own expert admits that such

injuries could well have been sustained in Zamora's headlong flight through the house. Dfts' Ex. Q.[10]

In summary, then, it appears that plaintiff's several attempts to invalidate the police version of events within the house based on scattered aspects of the physical evidence amounts to speculation alone. There thus appears to be no reason to seriously question the unanimous testimony of officers Drummer, Rice, and Young.

IV. CONCLUSION

It is the opinion of the Court that defendants have demonstrated that the officers involved in the June, 1982, events had probable cause both to arrest Zamora and to enter his residence in order to effect that arrest. The Court further finds that, once inside, the police acted n self-defense, and used only reasonable force when Rice was attacked by decedent.

Plaintiff, however, has failed to show that there exist genuine issues of material fact within the meaning of Rule 56 sufficient to defeat the present motion. The largely inconsequential variances in the evidence upon which he sets such great store fail to raise more than a scintilla of evidence in support of any valid theory of liability.[11]

In view of the foregoing, and good cause appearing, defendant's motion for summary judgment is hereby GRANTED in full.

IT IS SO ORDERED.

Dated: October 10, 1985

J.P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT COURT

FOOTNOTES

1. The misdemeanors contemplated at this time were violations of California Penal Code §§ 417, exhibition of a deadly weapon, and 415(3), use of offensive words inherently likely to provoke an immediate violent reaction.

2. Nun-chaku sticks are a martial arts weapon consisting of two short pieces of wood joined by a length of rope or chain. Possession of nun-chaku sticks is a felony under California law. See Cal. Penal Code § 12020(a).

3. "5150" in the above narrative refers to California Welfare and Institutions Code § 5150, permitting 72-hour psychiatric detention and evaluation of mentally-disordered persons who represent a danger to themselves or others. California Penal Code § 187 defines the crime of murder.

4. Jacinto Clark Zamora, aged 26 at the time of his death, had a history of mental disorders, deriving from a motorcycle accident suffered some ten years previously. He had been hospitalized repeatedly, twice under Welfare and Institutions Code § 5150, at East Bay hospitals for episodes of psychotic behavior, and had in fact been diagnosed as either schizoid-affective or paranoid schizophrenic. Part of his condition was apparently a paranoiac reaction to others which caused him to threaten those around him. On occasion, these threats took tangible form. Thus, he admitted nearly breaking his girlfriend's jaw; during one of his hospitalizations he threatened hospital

staff members with death; and his mother reported that he would curse and yell at her, causing considerable fear on her part. His bizarre behavior was well known throughout the neighborhood, at least two neighbors having complained of his standing threats to kill everyone around him. See Dfts' Statement of Undisputed Material Facts, and Ex. A, B, C.

5. Exhibit 8 to the Duane Declaration consists of selected pages from the Deposition of Sergeant Lance House. The redaction offered to the Court, however, distorts the meaning of Sergeant House's testimony. As the omitted pages 14-19 indicate, Hose did not state that Zamora should not be taken into custody: he merely questioned the wisdom of entering the house to arrest a man whom he considered to be armed and insane. See Dfts' Ex. Am.

6. This potentially lethal wound subsequently required major surgery. See Austin Decl.

7. It is noteworthy, however, that a subsequent page of the Radio Room tape -- not furnished in plaintiff's exhibit -- reveals that in his call Drummer states that Zamora had "made threats to the neighbors, came outside with a bow and arrow, etc., etc...." Boley Decl., Ex. C. That Drummer made reference to a bow and arrow so early in the siege ill comports with plaintiff's apparent theory that decedent's presentation of weapons while outside his home was a desparate police afterthought.

8. The photograph taken of decedent after the shooting shows the nun-chakus in

precisely the position described by the police.

9. Dr. Ferrer's credibility is somewhat in doubt. First, he has had no special training in the operation of the nervous system. Dfts' Ex. R. According to the Austin Declaration, Dr. Ferrer's testimony revealed a number of fundamental mistakes about anatomy and the operation of the heart following death. Finally, his testimony appears to have been internally inconsistent. His Declaration states merely that "[i]t is doubtful ... that [Zamora] would have retained control over any object in his hand...." In a later deposition he testified that under all circumstances the sword would have fallen from Zamora's hand after the shooting.

Plaintiff's entire argument concerning the sword is calculated to raise the inference that the police officers placed it in Zamora's hand after the shooting. This overlooks the fundamental fact that, at some point, Zamora stabbed Rice. For plaintiff to suggest any other hypothesis -- e.g., that, after shooting Zamora the uninjured Rice consented to receive a grave stab wound in order to conceal the misdeeds of this colleagues -- is not only absurd on its face but is contradicted by the testimony of his own forensic expert. See deft's Ex. T, U.

10. On July 30, 1985, plaintiff filed with the Court a sur-opposition brief. The Court has not ordered further briefing on the present motion for summary judgement. However, an inspection of this document, its exhibits, and the similarly untimely sur-reply brief filed on day

later by defendants, exposes the flaws in plaintiff's argument.

The sur-opposition consists chiefly of a rough diagram of the Zamora home, with supporting "explanation," executed by a criminologist named Lowell D. Bradford. Two circles are drawn thereon, of varying sizes, purporting to represent the relative positions of Zamora and Rice n the living room at the time of the former's death. The thrust of this document, it is supposed, is to demonstrate that the parties involved in the incident were farther from one another than police testimony has indicated, this hypothesis tending, it is further supposed, to support plaintiff's theory that the officers were under no immediate threat from Zamora, and that the rationale of self-defense does not apply.

Plaintiff first inverts the identification of the two circles, stating that the larger represents Zamora, the small, Rice. Based on the evidence in this case, the opposite appears to be true. Next -- whether willfully or not -- plaintiff states that the diagonal or hypotenuse of the room, 13'7", represents the distance between Rice and Zamora when Rice fired. It does not. Having thus unscrambled plaintiff's verbal legend, it is immediately apparent that, if anything, this diagram lends credence to defendants' theory.

The two circles are approximately four inches apart. On a portion of the diagram not reproduced in plaintiff's submission but furnished by defendants, the scale is given as one-half inch to one foot. This produces a distance between the circles of eight feet. In his Declaration, officer Rice estimates that, when he fired, Zamora was

approximately ten feet away, or two to three paces. Rice Decl., at ¶ 10. Thus, plaintiff's eleventh-hour effort, far from reinforcing his argument, bears out the police estimate of the distances involved.

11. Because the Court is granting the motion for summary judgment on the grounds that probable cause existed to make the arrest, and that the police were justified in using deadly force in their self-defense slaying of Zamora, it is unnecessary to reach defendants' alternate argument: that the doctrine of good faith immunity bars this lawsuit.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACINTO ZAMORA, Executor of the Estate of JACINTO CLARK ZAMORA, JR., Deceased,	)	No. 85-2773
	)	D.C. No. CV84-3677-JPV
Plaintiff/ Appellant	)	
v.	)	
GEORGE T. HART, individually, and as Chief of Police of Oakland, California; TOMMIE LEE YOUNG, individually and in his capacity as an employee of the City of Oakland; et al.,	)	
	)	MEMORANDUM*
Defendants/ Appellees.	)	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 21.

Appeal from the United States District Court for the Northern District of California
John P. Vukasin, District Judge, Presiding
Argued and Submitted November 12, 1986, San Francisco, California

Before: TANG, SCHROEDER, and NORRIS, Circuit Judges

We review a grant of summary judgment de novo. Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986). viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id. Appellant alleges three separate deprivations of Zamora's civil rights which we evaluate individually.

I

Appellant argues first that there is a genuine issue of material fact as to

whether the officers had probable cause to make a warrantless arrest of Zamora while he was on his porch the third time. Appellees retort that the officers had probable cause to arrest Zamora under three separate theories. First, they claim that the officers had probable cause to detain Zamora under California Welfare & Institutions Code § 5150, which provides, "When any person, as a result of mental disorder, is a danger to others or to himself or herself . . . a peace officer . . . may, upon probable cause, take, or cause to be taken, the person into custody . . . ." Second, appellees claim that the officers had probable cause to arrest Zamora for the possession of nunchaku, which is a felony under Cal. Penal Code § 12020. Last, appellees also argue that the police are authorized to arrest a suspect for a misdemeanor committed in the presence of the arresting

officers. Cal. Penal Code § 836. In this case, the officers claim that the misdemeanor Zamora committed was the use, in a public place, of offensive words "which are inherently likely to provoke an immediate violent reaction." Cal. Penal Code § 415(3).

Responding to the first ground, appellant asserts that without evidence that Zamora possessed weapons while on his porch, the police could not have had probable cause to believe that Zamora constituted a danger to himself or others as required by Cal. Welf. & Inst. Code § 5150.[1/] By introducing the declarations of Zamora's neighbors, which indicate that

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1/ There is no dispute that plaintiff was in fact the victim of a mental disorder and that the police were justified in believing Zamora was mentally disturbed at the time of this arrest.

Zamora did not display either a knife or nunchaku while on the porch, appellant claims to create a genuine issue of material fact as to whether there was probable cause to believe Zamora was a danger to himself or others. We agree.

"To constitute probable cause to detain a person pursuant to section 5150, a state of facts must be known to the peace officer . . . that would lead a person of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person detained is mentally disordered and is a danger to himself [or others] . . . ." People v. Triplett, 144 Cal. App. 3d 283, 288, 192 Cal. Rptr. 537, 541 (1983). The mere fact that Zamora was shouting threats from his porch would not suffice to justify the officers' attempted arrest of Zamora; they must show that he also brandished weapons in a sufficiently threatening manner to

permit the conclusion that he was a danger to himself or others.[2/] By producing contrary eyewitness testimony, however, appellant has clearly created a factual issue as to whether Zamora actually possessed a knife or nunchaku while on the porch. there is uncontroverted evidence of Zamora's possession of the bow, but there is little in the record to show that that possession was sufficiently threatening to warrant the conclusion that Zamora was an immediate danger to those

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2/ The officers argue that under Whaley v. Jansen, 208 Cal. App. 2d 222, 25 Cal. Rptr. 184 (1962), actual violence or imminent threat of violence is not required for arrest under § 5150. Were this true, we would have serious doubts about the constitutionality of the California statute. We do not reach that issue, however. Since we remand this case on other grounds as well, we decline to reach out for the constitutional issue in the absence of any factual findings on what actually occurred on June 28, 1982.

around him. Thus, Judge Vukasin erred by balancing the weight and credibility of the evidence before him and determining that Zamora did possess both the knife and the nunchaku while on the porch. It is blackletter law that the resolution of directly conflicting eyewitness testimony is a jury function, not one for the judge on summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2513 (1986).

The police also claim that they had probable cause to take Zamora into custody for possession of nunchaku. As described above, notwithstanding Judge Vukasin's disbelief of appellant's eyewitnesses, there is a clear factual issue as to whether Zamora in fact carried the nunchaku into public.

Finally, the officers assert that Zamora's threats and racial epithets were both offensive and "inherently likely to

provoke an immediate violent reaction." Cal. Penal Code § 415(3). The district court did not even bother to find that Zamora's statements were inherently likely to provoke an immediate violent reaction, yet it granted summary judgment on this issue as well. In support of the district court's ruling, appellees argue that there is no factual issue as to Officer Drummer's claim that Robert Young threatened to "take matters into his own hands." That statement, they assert, is sufficient to remove any genuine issue as to whether Zamora's harangues were likely to provoke an immediate violent reaction.

We disagree. Although statements such as Zamora's may be "inherently likely to provoke an immediate violent reaction" under some circumstances, the single hearsay comment of one of the named defendants in this action is insufficient to eliminate all genuine factual questions

regarding the likelihood of violence resulting from Zamora's slurs.

II

Because the legality of the officers' pursuit of Zamora into his house depends on the legality of the attempted public arrest, the district court also erred in granting summary judgment on the illegal entry question. See United States v. Santana, 427 U.S. 38, 43 (1976) ("[A] suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under [Under States v.] Watson, [423 U.S. 411 (1976)], by the expedient of escaping to a private place.")

III

Finally, appellant argues that regardless of the legal status of the officers' warrantless entry into the home, a genuine issue of material fact was raised as to whether the officers actually

shot Zamora in self-defense. Although appellees, as the moving parties, bear the "burden of shoeing the absence of any genuine issue of fact," Adickes v. S.H. Kress & Co., 398 U.S. 144, 153 (1970), the nonmoving party must come forward with specific facts to enable a jury to return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511-12, (1986).

Appellant argues that he has submitted circumstantial evidence sufficient to permit a jury to infer that Zamora was disarmed by the officers and then shot when he was no longer a danger to them. Specifically, the declaration of Jose Ferrer, M.D., an employee of the San Francisco Coroner's Office, states that it is doubtful whether Zamora could have retained his grip on a sword after being shot in the head as described by the officers. Declaration of Jose Ferrer,

M.D. at 2, July 16, 1985. More importantly, on the day following Zamora's death, Officer Tommie Young admitted that after Zamora was shot, "I saw [Zamora] fall back, uh, instead of holdin' on to the knife, the knife went up in the air and then he fell against the wall and then fell to the floor."[3/] Further Declaration of Todd Boley in Support of Motion for Summary Judgment, Exhibit N at 19 (Statement of Officer Tommie Young,

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3/ Appellees now dispute the accuracy of the transcript of Officer Young's interview which they themselves submitted, claiming Officer Young really said, "I saw Clark [Zamora] fall back, uh, still holdin' on to the knife, the knife went up in the air and then he fell against the wall and then fell to the floor." This disagreement merely highlights the existence of disputed issues of fact. Moreover, even if appellees' version of Officer Young's statement is correct, appellees still does not explain the undisputed admission that "the knife went up in the air."

June 29, 1982). The police photograph of Zamora's dead body shows the sword still lying in Zamora's right hand, however. Declaration Richard P. Duane, Exhibit 33. We hold that a reasonable jury could infer from Dr. Ferrer's expert testimony and Officer Young's admission that the officers must have placed the knife in Zamora's hand immediately after the was shot. If the officers moved the knife in order to make the death look like a case of self-defense, the jury could further infer that the police were attempting to cover up the fact that Zamora was not killed in self-defense.

In granting summary judgment to the appellees, the district judge decided there was no factual issue because he opted to disbelieve appellant's witnesses. For example, the district judge may have personally believed the declaration of appellees' expert was more persuasive than

that of appellant's expert, but "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inference from the facts are jury functions, not those of the judge . . . ." Anderson, 106 S. Ct. at 2513. See also California Steel and Tube v. Kaiser Steel Corp., 650 F.2d 1001 (9th Cir. 1981). The district judge did not find Dr. Ferrer "obviously unqualified" to testify as an expert, nor could he; he therefore erred by judging Dr. Ferrer's credibility and balancing his testimony against that of appellees' expert, Dr. Austin. See California Steel, 650 F.2d at 1003. "[e]ven if the trial judge is convinced plaintiffs will eventually lose, he may not resolve genuine issues of material fact at the summary judgment stage. Bieghler v. Kleppe, 633 F.2d 531, 534 (9th Cir. 1980).

REVERSED and REMANDED.

§ 5150. Dangerous or gravely disabled person; taking into custody; application; basis of probable cause; liability

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Such facility shall require an application in writing stating the circumstances under which the person's

condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false.

§ 5151. Detention for evaluation; services provided

If the facility for 72-hour treatment and evaluation admits the person, it may detain him or her for evaluation and treatment for a period not to exceed 72

hours. Saturdays, Sundays, and holidays may be excluded from the 72-hour period if the Department of Mental Health certifies for each facility that evaluation and treatment services cannot reasonably be made available on those days. The certification by the department is subject to renewal every two years. The department shall adopt regulations defining criteria for determining whether a facility can reasonably be expected to make evaluation and treatment services available on Saturdays, Sundays, and holidays.

If in the judgment of the professional person in charge of the facility providing evaluation and treatment, or his designee, the person can be properly served without being detained, he shall be provided evaluation, crisis intervention, or other inpatient or outpatient services on a voluntary basis.

§ 5152. Evaluation; treatment and care; release or other disposition

Each person admitted to a facility for 72-hour treatment and evaluation under the provisions of this article shall receive an evaluation as soon after he is admitted as possible and shall receive such treatment and care as his condition requires for the full period that he is held. Such person shall be released before 72 hours have elapsed if, in the opinion of the professional person in charge of the facility, or his designee, the person no longer requires evaluation or treatment.

Persons who have been detained for evaluation and treatment shall be released, referred for further care and treatment on a voluntary basis, certified for intensive treatment, or a conservator or temporary conservator shall be

appointed pursuant to this part as required.

§ 5200. Persons who may be given evaluation; consideration of privacy and dignity

Any person alleged, as a result of mental disorder, to be a danger to others, or to himself, or to be gravely disabled, may be given an evaluation of his condition under a superior court order pursuant to this article. The provisions of this article shall be carried out with the utmost consideration for the privacy and dignity of the person for whom a court-ordered evaluation is requested.

§ 5201. Petition by individual

Any individual may apply to the person or agency designated by the county for a petition alleging that there is in the county a person who is, as a result of mental disorder a danger to others, or to himself, or is gravely disabled, and

requesting that an evaluation of the person's condition be made.

§ 5292. Pre-petition screening; report of findings

The person or agency designated by the county shall prepare the petition and all other forms required in the proceedings, and shall be responsible for filing the petition. Before filing the petition, the person or agency designated by the county shall request the person or agency designated by the county and approved by the State Department of Mental Health to provide prepetition screening to determine whether there is probable cause to believe the allegations. The person or agency providing prepetition screening shall conduct a reasonable investigation of the allegations and make a reasonable effort to personally interview the subject of the petition. The screening shall also determine whether the person will agree

voluntarily to receive crisis intervention services or an evaluation in his own home or in a facility designated by the county and approved by the State Department of Mental Health. Following prepetition screening, the person or agency designated by the county shall file the petition if satisfied that there is probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled, and that the person will not voluntarily receive evaluation or crisis intervention.

If the petition is filed, it shall be accompanied by a report containing the findings of the person or agency designated by the county to provide prepetition screening. The prepetition screening report submitted to the superior court shall be confidential and shall be subject to the provisions of Section 5328.

§ 5206. Order for evaluation; issuance; service; presence of advisors; procedure on non-appearance; release or other disposition

Whenever it appears, by petition pursuant to this article, to the satisfaction of a judge of a superior court that a person is, as a result of mental disorder, a danger to others, or to himself, or gravely disabled, and the person has refused or failed to accept evaluation voluntarily, the judge shall issue an order notifying the person to submit to an evaluation at such time and place as designated by the judge. The order for an evaluation shall be served as provided in Section 5208 by a peace officer, counselor in mental health, or a court-appointed official. The person shall be permitted to remain in his home or other place of his choosing prior to the time of evaluation, and shall be permitted to be accompanied by one or more

of his relatives, friends, an attorney, a personal physician, or other professional or religious advisor to the place of evaluation. If the person to receive evaluation so requests, the individual or individuals who accompany him may be present during the evaluation.

If the person refuses or fails to appear for evaluation after having been properly notified, a peace officer, counselor in mental health, or a court-appointed official shall take the person into custody and place him in a facility designated by the county as a facility for treatment and evaluation. The person shall be evaluated as promptly as possible, and shall in no event be detained longer than 72 hours under the court order, excluding Saturdays, Sundays, and holidays if treatment and evaluation services are not available on those days.

Persons who have been detained for evaluation shall be released, referred for care and treatment on a voluntary basis, certified for intensive treatment, or recommended for conservatorship pursuant to this part, as required.

§ 5250. Time limitation on certification for intensive treatment; grounds for certification

If a person is detained for 72 hours under the provisions of Article 1 (commencing with Section 5150), or under court order for evaluation pursuant to Article 2 (commencing with Section 5200) or Article 3 (commencing with Section 5225) and has received an evaluation, he or she may be certified for not more than 14 days of intensive treatment related to the mental disorder or impairment by chronic alcoholism, under the following conditions:

(a) The professional staff of the agency or facility providing evaluation

services has analyzed the person's condition and has found the person is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled.

(b) The facility providing intensive treatment is designated by the county to provide intensive treatment, and agrees to admit the person. No facility shall be designated to provide intensive treatment unless it complies with the certification review hearing required by this article. The procedures shall be described in the county Short-Doyle plan as required by Section 5651.3.

(c) The person has been advised of the need for, but has not been willing or able to accept, treatment on a voluntary basis.

§ 5256. Necessity and time for certification review hearing

When a person is certified for intensive treatment pursuant to this article, a certification review hearing shall be held unless judicial review has been requested as provided in Sections 5275 and 5276. The certification review hearing shall be within seven days of the initial detention of the person unless postponed by request of the person or his or her attorney or advocate. Hearings may be postponed for 48 hours or, in counties with a population of 100,000 or less, until the next regularly scheduled hearing date.

§ 5256.5. Termination of involuntary detention upon finding of lack of probable cause; certified person voluntarily remaining at facility

If at the conclusion of the certification review hearing the person conducting the hearing finds that there is not probable cause to believe that the person certified is, as a result of a

mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled, then the person certified may no longer be involuntarily detained. Nothing herein shall prohibit the person from remaining at he facility on a voluntary basis or the facility from providing the person with appropriate referral information concerning mental health services.

§ 5300. Additional confinement; grounds, duration; treatment, necessity, amenability

At the expiration of the 14-day period of intensive treatment, a person may be confined for further treatment pursuant to the provisions of this article for an additional period, not to exceed 180 days if one of the following exists:

(a) The person has attempted, inflicted, or made a serious threat of substantial physical harm upon the person of another after having been taken into

custody, and while in custody, for evaluation and treatment, and who, as a result of mental disorder or mental defect, presents a demonstrated danger of inflicting physical harm upon others.

(b) The person had attempted, or inflicted physical harm upon the person of another, that act having resulted in his or her being taken into custody and who presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm upon others.

(c) The person had made a serious threat of substantial physical harm upon the person of another within seven days of being taken into custody, that threat having at least in part resulted in his or her being taken into custody, and the person presents, as a result of mental disorder or mental defect, a demonstrated

danger of inflicting substantial physical harm upon others.

Any commitment to a licensed health facility under this article places an affirmative obligation on the facility to provide treatment for the underlying causes of the person's mental disorder.

Amenability to treatment is not required for a finding that any person is a person as described in subdivisions (a), (b), or (c). Treatment programs need only be made available to these persons. Treatment does not mean that the treatment be successful or potentially successful, and it does not mean that the person must recognize his or her problem and willingly participate in the treatment program.

§ 12020. Concealed weapons, ammunition, explosive substances, metal plate weapons, etc.; manufacture, import, sale, etc. prohibited; exceptions; definitions

(a) Any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun or wallet gun, any firearm which is not immediately recognizable as a firearm, any ammunition which contains or consists of any flechette dart, any bullet containing or carrying an explosive agent, or any instrument or weapon of the kind commonly known as a backjack, slungshot, billy, nunchaku, sandclub, sandbag, sawed-off shotgun, or metal knuckles, or who carries concealed upon his or her person any explosive substance, other than fixed ammunition or who carries concealed upon his or her person any dirk or dagger, is

guilty of a felony, and upon conviction shall be punishable by imprisonment in the county jail not exceeding one year or in a state prison. A bullet containing or carrying an explosive agent is not a destructive device as that term is used in Section 12301.

(b) Subdivision (a) does not apply to any of the following:

(1) The manufacture, possession, transportation or use, with blank cartridges, of sawed-off shotguns solely as props for motion picture film or television program production when * * * authorized by the Department of Justice pursuant to Article 6 (commencing with Section 12095) of this chapter and * * * not inviolation of federal law.

(2) The possession of a nunchaku on the premises of a school which holds a regulatory or business license and teaches the arts of self-defense.

(3) The manufacture of a nunchaku for sale to, or the sale of a nunchaku to, a school which holds a regulatory or business license and teaches the arts of self-defense.

(4) Any antique firearm. For purposes of this section, * * * "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(5) Tracer ammunition manufactured for use in shotguns.

(6) Any firearm or ammunition which is a curio or relic as defined in Section 178.11 of Title 27 of the Code of Federal Regulations and which is in the possession of a person permitted to possess such items pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto. Any person prohibited by Section 12021 or 12021.5 of this code or Section 8103 of the Welfare and Institutions Code from possessing such firearms or ammunition who obtains title to such items by bequest or intestate succession may retain title for not more than one year, but actual possession of such items at any time shall be punishable pursuant to Section 12021 or 12021.5 of this code or Section 8103 of the Welfare and Institutions Code. Within such year

the preson shall transfer title to such firearms or ammunition by sale, gift, or other disposition. Any person who violates this paragraph is in violation of subdivision (a).

(7) Any other weapon as defined in subsection (e) of Section 5845 of Title 26 of the United States Code and which is in the possession of a person permitted to possess the weapons pursuant to the federal Gun Control Act of 1968 (Public Law 90-618), as amended, and the regulations issued pursuant thereto. Any person prohibited by Section 12021 or 12021.5 of this code or Section 8103 of the Welfare and Institutions Code from possession these weapons who obtains title to these weapons by bequest or intestate succession may retain title for not more than one year, but actual possession of these weapons at any time is punishable pursuant to Section 12021 or 12021.5 of

this code or Section 8103 of the Welfare and Institutions Code. Within that year the person shall transfer title to the weapons by sale, gift, or other disposition. Any person who violates this paragraph is in violation of subdivision (a). The exemption provided in this subdivision does not apply to pen guns.

(c) Any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any instrument, without handles, consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond, or other geometric shape for use as a weapon for throwing is guilty of a felony, and upon conviction shall be punishable by

imprisonment in the county jail not exceeding one year or in a state prison.

(d)(1) As used in this section a "sawed-off shotgun" means any firearm (including any revolver) manufactured, designed, or converted to fire shotgun ammunition having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by manufacture, alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches.

(2) As used in this section, a "nunchaku" means an instrument consisting of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire or chain, in the design of a weapon used in connection with the practice of a system of self-defense such as karate.

(3) As used in this section, a "wallet gun" means any firearm mounted or enclosed in a case, resembling a wallet, designed to be or capable of being carried in a pocket or purse, if such firearm may be fired while mounted or enclosed in such case.

(4) As used in this section, a "cane gun" means any firearm mounted or enclosed in a stick, staff, rod, crutch or similar device, designed to be capable of being used as an aid in walking, if such firearm may be fired while mounted or enclosed therein.

(5) As used in this section, a "flechette dart" means a dart, capable of being fired from a firearm which measures approximately one inch in length, with tail fins which take up five-sixteenths of an inch of the body.

(6) As used in this section, "metal knuckles" means any device or instrument

made wholly or partially of metal which is worn for purposes of offense or defense in or on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs which would contact the individual receiving a blow.

(e) Knives carried in sheaths which are worn openly suspended form the waist of the wearer are not concealed within the meaning of this section.

§ 415. Fighting; noise; offensive words

Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine:

(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.

(2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.

(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

§ 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2002c/ax0712t

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACINTO ZAMORA, Executor of the Estate of JACINTO CLARK ZAMORA, JR. Deceased,

Plaintiff/ Appellant,

v.

GEORGE T. HART, Individually, and in his capacity as Cheif of Police of Oakland, California; TOMMIE LEE YOUNG, individually and in his capacity as an employee of the City of Oakland; et al.,

Defendants/ Appellees.

_____/

FILED APR 20, 1987

No. 85-2773

D.C. No. CV 84-3677JPV

ORDER

Before: TANG, SCHROEDER, and NORRIS, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for

rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

2002c/ax0712t